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To be argued by
John S. Wise, Jr., Esq.

Supreme Court of the United States

October Term 1924.

ERIE COAL & COKE CORPORATION,
Appellant,

against

THE UNITED STATES.

No. 78

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE APPELLANT.

When this case was before the Court of Claims the Attorney General relied principally upon Revised Statute Section 3744 as ground for the Government's demurrer. The point was discussed at length in the briefs of both sides and extensively argued orally. It will be noted that the opinion of the Court below completely ignored the defense, a fact which in itself would logically indicate that the subject did not make a serious impression. That the Court of Claims was of the opinion that the statute was inapplicable to the case at bar becomes more apparent by reference to the subsequent opinion rendered on March 17, 1924, in *Swift & Company* v. *The United States*, to which we will refer hereafter.

POINT I.

Revised Statute, Section 3744, cannot be relied upon to sustain the Government's demurrer.

A.

The adjudicated facts in the case at bar are beyond the scope and clear intent of Revised Statute, Section 3744.

When Congress enacted Revised Statute, Section 3744, it did not intend it to change or affect the substantive law of contracts. The intent was merely to regulate and prescribe the duties of the three secretaries for the purpose of preventing the perpetration of fraud upon the Government by its own officers. This is clearly indicated by the original title of the act:

> "An Act to prevent and punish fraud on the part of officers intrusted with the making of contracts for the Government."

The title of the act is properly to be considered. In *United States* v. *Fisher*, 2 Cranch, 358, 386, Chief Justice MARSHALL said:

> "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

The statute under consideration was enacted on June 2, 1862, while the country was in the throes of civil war and the Government was purchasing military supplies and negotiating for construction work. This purpose of the act was clearly defined by Mr. Justice MILLER, speaking for this court in *Salomon* v. *United States*, 19 Wall.,

17, wherein he referred to the act as "The Act of 1862, requiring contracts for military supplies to be in writing * * * ." And in *United States* v. *New York and Porto Rico Steamship Company*, 239 U. S., 88, Mr. Justice HOLMES, in his opinion said:

> "The section originally was part of the Act of June 2, 1862, c. 93, 12 Stat., 411, and its purpose is manifested by the scope of the act and its title. It is called 'An Act to prevent and punish fraud on the part of officers intrusted with making of contracts for the government,' and this was recognized as the purpose in *Clark* v. *United States*, 95 U. S., 539, * * * ."
>
> "We see no reason for extending the implication of the Act beyond the evil that it seeks to prevent."

It is conceded that the statute is couched in broad terms and refers to "every contract," but the very use of this broad language makes it necessary to inquire into the legislative intent. This principle of statutory construction was adopted by this Court in *Church of the Holy Trinity* v. *United States*, 143 U. S., 457. In that case the statute under discussion was the Act of February 26, 1885, 23 Stat., 332, c. 164, which read as follows:

> "That from and after the passage of this Act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its territories or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or services of any kind in the United States, its territories, or the District of Columbia."

It would be difficult to compose language more comprehensive and conclusive in scope and general terms, yet this Court, after looking into the history, the title, and the intent of the Act, decided that the employment of a rector by the defendant did not come within the statute. In the course of its opinion through Mr. Justice BREWER this Court said:

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.
>
> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.
>
> • • • • • • • • •
>
> "The construction invoked can not be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore can not be within the statute."

Applying the principles of statutory construction set out in the above stated opinion to the case at bar and the applicability thereto of Revised Statute, Section 3744, the adjudicated facts in the ~~respondent's~~ APPELLANT'S petition are clearly outside the statute.

The title of the act shows that it was designed to prevent and punish the perpetration of fraud upon the

Government by its own officers. The Secretary of War publicly advertised the auction sale and the ~~respondent~~ APPELLANT in public competition with over one hundred other bidders, representing the nitrate trade of the country, had three of its bids accepted by the fall of the hammer and the acceptance of its 10 per cent. deposit as a part payment on account of the last shipment. The published terms further stipulated that the ~~respondent~~ APPELLANT's 10 per cent. payment would be forfeited to the United States if the ~~respondent~~ APPELLANT did not execute a formal contract within ten days after notice of acceptance of its bid. It is clearly evident that the Secretary of War took every precaution to assure the execution of a formal contract and that when the sale was over, both parties were contractually bound to execute it. This precaution and the contractual relation resulting therefrom were the very opposite of the evil which the statute was designed to prevent.

The historical background of the statute also leads to the conclusion that it was not intended to apply to the case at bar. When the statute was passed in 1862, the Government was purchasing supplies and paying out money. And even then, Congress undertook to relieve the several departments of the necessity for formal contracts in cases of emergency (Revised Statute, Section 3709). In *Cobb* v. *United States*, 7 Ct. Cl., 470, it was held that Section 3744 was enacted with reference "to the ordinary business of the departments specified."

Sixty years after the enactment of Revised Statute, Section 3744, the termination of the World War found the War Department stocked with a huge amount of supplies and it became necessary to liquidate. In the words of the War Department pamphlet mentioned in our first brief, "The sudden cessation of hostilities found War Department Warehouses choked with more than two billion dollars worth of these high grade materials." This was the condition existing in the War Department

when on July 11, 1919, Congress passed the Act authorizing the Secretary of War to sell "any surplus supplies * * * upon such terms as may be deemed best." (The section is quoted in full on page 3 of our first brief.) In speaking of war legislation, Mr. Justice HOLMES, writing for this Court in *American Smelting Co.* v. *United States*, 259 U. S., 75, says the Acts are to be interpreted in the light of the conditions that brought them about. It would appear that Congress intended to give to the Secretary of War, broad business powers unrestrained by the narrow limitations upon the department's ordinary business. It must be admitted that the War Department has so construed and exercised the authority.

It is as illogical to pretend that the Act of July 11, 1919, is subject to the provisions of Revised Statute, Section 3744, as it would be to prosecute a modern surgeon under the old statute against blood-letting in the highway. The enabling Act of July 11, 1919, was clearly special legislation to meet the requirements of an abnormal condition existing in the War Department.

To hold that Section 3744 applies to the case at bar would lead to absurdities. This was the third test applied in *United States* v. *Church of the Holy Trinity* (*supra*).

Acting under the broad authority conferred upon him in the Act of July 11, 1919, the Secretary of War has adopted three methods of disposing of the two billion dollars' worth of surplus material, i. e., sealed bid, public auction and fixed price. Bearing in mind that in these transactions the Government has possession of the goods and is the recipient of money, and that the purchase, in the words of the War Department's advertising pamphlet quoted in our first brief, at page 12, "resembles nothing so much as an ordinary, every day, 'over the counter' transaction," it would appear that not only does

the publicity of the sale make it impossible to perpetrate a fraud upon the Government, but to require in these transactions a written formal contract "with the names of the parties at the end thereof," would in many instances impede the business of the department, discourage purchasers, and thwart the clear intent of Congress in passing the enabling Act.

That Congress in passing the enabling Act in the form of a proviso to the military appropriations bill of July 11, 1919 (41 Stat., 105), intended to clothe the War Department with authority to dispose of its billions of surplus as a huge mercantile corporation would act, free from the ordinary restraints pertaining to its customary routine transactions, there can be no doubt, when reference is had to contemporaneous debates which took place in Congress. An item of one million dollars was provided for in committee to support a Director of Sales who was to dispose of all the surplus stocks. The item was successfully attacked in the Committee of the Whole and the proviso now contained in the Act was inserted. It is the third of a series of statutes by Congress deemed necessary to enable the Government to handle the disposition of the unprecedented and enormous stock of war materials in this country and in Europe, mounting, not into mere millions, but into billions of dollars in value. The quality and purpose of this legislation, its meaning and its interpretation, is found in the debates of the Sixty-sixth Congress, First Session, Congressional Record, Part I, page 984, where the following colloquy occurred:

> "Mr. Dent: Is it not a fact that by consolidating this million dollar appropriation under this item in the head of the director of sales we are saving many more millions that would absolutely have to be expended by the Ordnance Department, by the Quartermaster's Department, by the Signal Corps, and every other branch of the service?

> Mr. Kahn: That is the idea, exactly, and I thank the gentleman for his statement. As a matter of fact, if we do not have this one consolidated division, that will dispose of these commodities, the very condition that the gentleman from Alabama (Mr. Dent) refers to would exist. These separate bureaus of the War Department and other departments would be called upon to engage in the business of selling their surplus stocks."

It was even suggested that foodstuffs could be sold through the Parcels Post, whereupon Mr. Kahn, chairman of the Military Appropriations Committee of the House, replied:

> "Mr. Chairman, the gentleman seems to think that the only question involved here is the sale of foodstuffs. That is only an incident. There are hundreds of items, as I stated; there are some hundreds of locomotive cranes; there are railroad cars, acids, chemicals, raw material, scrap, and all kinds of material to be sold."

It is impossible to read the debates in Congress and logically conclude that Congress intended to prevent the War Department from disposing of its enormous surplus stocks except by way of a formal written contract of the kind provided for in Revised Statute Section 3744.

B.

Both parties were contractually bound to memorialize their agreement by a writing, but the agreement was none the less complete and neither Section 3744 of the Revised Statutes nor the default of the Government is a defence against the appellant's claim upon the clear agreement.

It is an elementary principle of law that two contracting parties are firmly bound before the formal execution of a written contract. The rule has been crisply

stated by Lord Chancellor CRANWORTH in *Ridgway* v. *Wharton*, 6 H. of L. cases, 238, as follows:

> "If the parties have entered into an agreement, they are not the less bound by that agreement because they say we sent it to a solicitor to have it reduced to form."

The principle has been adopted by this Court in *Garfielde* v. *United States*, 93 U. S., 242, and *Purcell Envelope Co.* v. *United States*, 249 U. S., 313, 329, from both of which cases we have quoted in our first brief at pages 14 and 15.

The appellant contends that this elementary and salutary principle of law is not affected by Revised Statute Section 3744, and has withstood and survived the apparent rigor with which the statute has been applied.

In this connection the case of *Harvey* v. *United States*, 105 U. S., 671, is an illuminating authority because the Government there relied upon Section 3744. There was a formal contract, but the claimant asked reformation and the Government took the untenable position that under Section 3744 there was no contract at all except and until the formal written contract was executed. This Court reversed the Court of Claims and said at page 688:

> "The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the cofferdam work. *Garfielde* v. *United States*, 93 U. S., 242; *Equitable Insurance Co.* v. *Hearne*, 20 Wall., 494. The written contract, in that respect, was intended by both parties to be merely a reduction to form of the statement as to work and prices contained in the bid."

It will be noted that the authority relied upon by this Court in the foregoing opinion was *Garfielde* v. *United*

States (*supra*), and it is significant that in the latter case, both this Court and the Court of Claims (11 Ct. Cl., 592) relied upon *Adam's Case,* 1 Ct. Cl., 192, which latter case was solely a determination of the applicability of Revised Statute 3744 to these classes of cases. In the *Adams* case (*supra*), the Court of Claims said:

> "The Act of June 2, 1862 (Revised Statute, Section 3744), requiring officers making contracts to sign at the end, make affidavit of their correctness, and file a copy of each of such contracts in the return office, has nothing to do with the case. The law does not make the doing of those things prerequisites to the validity of the contract. Nor would the failure of the officer to perform his duty in this respect affect the validity of the contract, either so far as the claimant or the United States is concerned. It would subject him to the penalties prescribed in the act for neglect or dereliction of duty; and, indeed, was intended as a better security to the United States against the fraud and collusion of their own officers."

It thus becomes apparent that this Court has adopted the principle that an agreement to memorialize is binding upon both parties and that the failure of one to perform entitles the other to damages (*Garfielde* v. *United States*, 93 U. S., 242). In *Purcel Envelope Co.* v. *United States*, 249 U. S., 313, page 329, this Court reaffirmed the principle, relying upon the *Garfielde* case, and said:

> "It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the Government contends they should have been, both by the terms of the contract and by a statute of the United States (28 Stat., 279). Their formal execution, as we have seen, was not essential to the consummation of the contract."

The appellant respectfully contends that the use of the language "both by the terms of the contract and by a statute of the United States," in the foregoing opinion, is peculiarly applicable to the case at bar and is a complete answer to the arguments of the Government in relying upon Revised Statute Section 3744.

Neither this Court nor the Court of Claims has ever upheld the Government's reliance upon Section 3744 in a case where, as in the case at bar, *there was an agreement to memorialize and the claimant was ready, willing and able to do so.* This Court has, however, in the *Harvey* case (*supra*) distinctly held that both parties were firmly bound before the execution of the formal contract. And, indeed, this is the only logical view to take, when it is considered that Section 3744 only makes it the duty of the Secretary of War, to memorialize "contracts made by him." The very purpose of the statute presupposes the existence of a binding contract. The facts that the published terms of sale (Appellant's Exhibit B) required a formal contract; that the appellant was ready, willing and able to execute it, and demanded that the Secretary of War execute it; that appellant was under a penal forfeiture of $79,000 requiring it to execute, are sufficient to distinguish the case at bar from every case relied upon by the Solicitor General or decided in favor of the Government by this Court or the Court of Claims.

C.

The appellants conceded performance deprives the Government of the defence under Revised Statute Section 3744.

The appellant contends that Revised Statute Section 3744 has no applicability to Government auction sales of surplus war material sold pursuant to the enabling Act of July 11, 1919 (41 Stat., 105), which was special legis-

lation. But if this Court does not agree with such contention, it is respectfully submitted that the appellants conceded performance, avoids the effect of the statute according to well established principles uniformly advanced by this Court and the Court of Claims.

Before discussing these authorities, we wish to point out that in all prior cases the point in question has arisen where the claimant was the *seller* or had performed labor or services. This observation is important and lends added force to the contention that the conditions existing in the War Department in 1919 were unusual, and unforeseen to Congress fifty-seven years before, when Section 3744 was enacted.

***Clark* v. *United States*, 95 U. S., 539.**

This case was a pioneer in the construction of this statute, and involved a verbal contract for the Government's use of the claimant's vessel, and an agreement to arbitrate its value in case of loss, an event which actually happened. Clark was allowed only the actual hire of his vessel up to the time it was lost and was denied the arbitration value. In the course of its opinion this Court said:

> "'We do not mean to say that where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services."

***United States* v. *Andrews*, 207 U. S., 229.**

The contract was made by correspondence, and in considering the contention that the contract did not conform to the requirements of Section 3744, it was said:

> " * * * but it is settled that the invalidity of a contract because of the non-compliance with the

> section referred to is immaterial after the contract has been performed."

Reverting now to the case at bar, it appears that the appellant was not selling material to, or performing labor and services for, the Government, but on the contrary was *buying* material *from* the Government. Performance on its part called for making a part payment upon the fall of the hammer, the execution of a contract "before delivery of nitrate." It is conceded by the demurrer that the appellant made the required part payment, and tendered full performance in all the remaining obligations; that the Government itself prevented and refused full performance, although the appellant was at all times ready and able and demanded the right to proceed.

The default was solely and entirely on the Government's part, yet we find the serious allegations of performance set forth in the appellant's petition disposed of by the Solicitor General on page 10 of the Government's brief in the following cursory way:

> "Mr. Justice HOLMES then points out that the 'invalidity of the contract is immaterial after it has been performed,' *a principle not involved here.*" (Italics ours.)

Not only is it conceded by the Government's demurrer that the appellant performed insofar as it was permitted, but it is respectfully submitted that as a matter of law *the appellant is entitled to the benefits of full performance.* This contention is but an illustration of an elementary principle of law that a defendant by preventing, or refusing to permit, full performance by the plaintiff, can not subsequently take advantage of his own wrong. This court, in *United States* v. *Beehan,* 110 U. S., 338, has already applied the principle against the Government, and reaffirmed it in *Lovell* v. *St. Louis Mu-*

tual Life Insurance Co., 111 U. S., 264, wherein Mr. Justice BRADLEY, speaking for this court, said:

> "Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of *United States* v. *Beehan*, 110 U. S., 339, to which we refer. It is unnecessary to discuss it further here."

In the recent case of *Swift & Company* v. *The United States*, decided by the Court of Claims on March 17, 1924, after their decision in the case at bar, a very complete review is made of all the decisions of this court on the subject of Revised Statute, Section 3744, and the effect of performance is elaborately treated.

The opinion, which was unanimous, contains the following statement:

> "Some of the authorities cited justify the conclusion that a partial performance is sufficient for the purpose under consideration and if, so stated, it is of doubtful application, the doubt is removed when it is added that if one party partially perform and is ready and willing to complete performance but is prevented or induced therefrom by the other, the latter may not take advantage of failure to fully perform. Under the facts of this case it seems to us that for the purpose under discussion the plaintiff is entitled to the benefits of full performance, but there is another view of the matter leading to the same result."

The foregoing opinion of the Court of Claims is peculiarly applicable to the conceded allegations of performance in the case at bar, and would clearly indicate that the Court below was of the opinion that Section 3744 could not be used to sustain the Government's demurrer.

D.

The cases relied upon in the Government's brief are not in point.

Before discussing the specific distinguishing features in the cases relied upon and cited in the Government's brief it should be observed that they are all distinguished from the case at bar by the fact that none of them involves:

1. The *sale* of goods by the Government;
2. A public auction;
3. Surplus war stocks;
4. Sale under special war legislation;
5. An agreement to memorialize;
6. A default *by the Government;*
7. Claimant bound by a penal forfeiture;
8. A claimant ready, willing and able and tendering performance.

Clark v. *United States*, 95 U. S., 539.

This was the first case involving Section 3744 to reach this Court and was decided over the strong dissenting opinion of Mr. Justice MILLER, with whom Justices FIELD and HUNT concurred. It has frequently been cited as authority for the broad statement that "the contract, not being in writing, is therefore void." It is respectfully submitted that the opinions of this Court in *Harvey* v. *United States*, 105 U. S., 671, and in *United States* v. *New York & Porto Rico Steamship Co.* (1915), 239 U. S., 88, not only limit the effect of the *Clark* case, but render it authority for nothing more than a ruling on the specific facts involved. It should also be observed that the oral agreement between Clark and the quartermaster included an understanding that *no written contract would be entered into* for the time being. This was a mutual and deliberate violation of the statute.

South Boston Iron Co. v. *United States,* 118 U. S., 37.

A consideration of the facts and opinion in this case discloses as pointed out in the opinion of the Court of Claims in *Swift & Company* v. *United States,* decided March 17, 1924, that it can hardly be construed as an authority on the subject of Section 3744. There was no advertisement by the Government or other call for proposals, but the claimant, apparently on his own initiative, submitted an offer to furnish boilers "as may be required" according to drawings and specifications which in fact were not then in existence, and the Navy Department's acceptance stated that "The specifications and drawings will be furnished as soon as possible." Within a few days the whole matter was abandoned by the department; and the claimant had neither performed any of the work nor been called on to do so. In the *Swift* case (*supra*) the Court of Claims clarifies the decision in the *South Boston Iron Works* case as follows:

> "The uncertainty as to what the plaintiff was to do was strongly urged by the defense in this court, and Judge RICHARDSON in his opinion cites the uncertainty by stating that 'If it should be held that these papers constitute valid contracts against the Government, it is not at all clear that they have been broken by the defendants.'"

That this Court was also of the opinion that the minds of the parties had never met, is evident from the following statement in its opinion:

> "We agree with the Court of Claims that the papers relied upon for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law."

Monroe v. *United States*, 184 U. S., 524.

The Solicitor General seems to place special emphasis upon this case at pages 6, 7 and 8 of the Government's brief. The point involved was clear and simple as pointed out by the Court of Claims in the *Swift & Company* case (*supra*). A written contract was actually entered into, and contained the provision: "This contract shall be subject to the approval of the Chief of Engineers of the United States Army," and this Court quite naturally held *the written contract* invalid because not so approved. In delivering the opinion of this Court, Mr. Justice McKenna said:

> "In other words, a final reviewing and approving judgment was given to the Chief of Engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that it was idle."

Its distinction from the case at bar is patent and it surely is not authority for the Government's argument.

St. Louis Hay & Grain Co. v. *United States*, 191 U. S., 159.

The contract in this case was lacking in the formalities required by Section 3744, but was *executed*, not executory. The claimant itself raised the point that the contract was void, thereby hoping to collect for its hay on the basis of *quantum valebat* which exceeded the amount due him in *quantum meruit* on the contract. The case belongs to the class where no formal written contract was entered into, provided for, *or even contemplated*. This Court decided against the claimant on the theory that there was a closed transaction. The opinion supports the contention of the appellant in the case at bar, and the conclusions of the Court of Claims in the

Swift & Company case (*supra*) that performance takes a case out of the statute. In *United States* v. *Andrews*, 207 U. S., 229, the case under discussion is cited by this Court as authority for the following statement:

> "but it is settled that the invalidity of a contract because of the non-compliance with the section referred to is immaterial after the contract has been performed."
>
> *McLaughlin & Co.* v. *United States*, 37 Ct. Cl., 150.

In this case the claimant sued to recover damages occasioned by the Government's delay in executing the formal contract. The following quotation from the opinion of Mr. Justice Howry, not only shows the real point involved, but conclusively demonstrates that the facts were just the opposite of those in the case at bar:

> "They made no effort, however, to complete the preliminaries. It does not appear that any demand was made for the formal execution of the contract, or that any request was preferred by them to be permitted to proceed, or that they tendered any bond in advance of the time the matter was actually closed."
>
> *Gillespie's Case*, 47 Ct. Cl., 310.

This case likewise belongs to that class where no written formal contract was provided for, intended, or even contemplated. In other words, the Government official and the claimant deliberately violated the statute.

> *American Dredging Co.* v. *United States*, 49 Ct. Cl., 350.

This case stripped of its surplussage and dicta is nothing more than a decision that when a written contract provides a time for the completion of its performance the Court cannot extend the time to adjust delay in entering into the contract. The discussion of Section 3744 then indulged is entirely beside the question.

POINT II.

Answering the Government's several arguments beyond the Revised Statute.

(A)

"Notice of Acceptance."

In the second paragraph, on page 11, of the Government's brief, the following argument is resorted to:

> "The conditions of sale already set forth plainly contemplated not merely a written contract as required by law, but a more formal acceptance of the bid than the fall of the auctioneer's hammer. 'Acceptance by the Government of any bid' was not to be final until the execution of a contract and bond, which was to be executed within ten days after 'notice of the acceptance' of the bid, not ten days after the auctioneer had acted. The bid then tentatively accepted was to be submitted to the Secretary, and if accepted by him, the bidder was to be given ten days notice to execute the contract and bond. To hold that the action of the auctioneer was final would be to divest the Secretary of the responsibility and discretion conferred upon him by the statute."

This argument is based upon a misappropriation of the language of a clause appearing on page 13 of the record to purposes not intended and which are covered by a separate clause on page 14, to which no reference whatever is made. The terms of the contract provide:

> "Purchaser will be required upon acceptance of his bid and before a delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract."

This language unequivocally refers to the acceptance of the bid which occurred upon the fall of the auctioneer's hammer. It does not provide that the contract shall be made ten days after notice of acceptance, as argued in the Government's brief above quoted (p. 11), but that the contract shall be put in writing and bond given upon the conditions specified, not within ten days after "notice of the acceptance" of the bid, as argued by the Government, but only "before delivery of nitrate".

The clause, on page 13 of the record, from which the Government's brief indulges the argument to which it resorts, is as follows:

> "Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of acceptance of his bid to execute said contract, the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire, free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages."

This is purely a penal forfeiture clause.

Only by absolute distortion of its language can it be construed as reserving to the Secretary of War a right to re-consider the acceptance effected upon the fall of the auctioneer's hammer, or right of rejection, such as is argued in the Government's brief.

This clause can only be fairly interpreted as conferring upon the Government the right, not to reject the bid, but to withdraw its acceptance in the single specified event that the "purchaser" shall fail to execute the requisite contract and bond "within ten days after notice of acceptance of his bid," in which event, the Government, after thus withdrawing "such acceptance" may "make such disposition of said nitrate as it may desire, free of any claim of *purchaser*, in which event the 10 per

cent. theretofore *paid upon the acceptance of said bid* shall be *forfeited* to the United States *as liquidated damages.*" There is nothing in this language to warrant the characterization of the bid as then "tentatively accepted," as argued by the Government, and there is nothing in either of these clauses from which it can be implied that such "tentatively accepted bid" was to be submitted to the Secretary, and, if accepted by him, the bidder shall be given ten days notice to execute the contract and bond, as argued in the Governments' brief, pages 11-12.

(B)

The Government Option Clause.

It is argued in respondent's brief, page 12, thus:

> "There is another consideration which should be noticed. One of the terms of sale which was to be incorporated into the contract was a provision that the Government, at its election might rescind the sale at any time before August 1, 1922, in which event the purchaser should immediately deliver to the Government sodium nitrate in equal quantity with that theretofore delivered by the Government to the purchaser.
>
> "Irrespective of any other considerations, this provision, in its practical effect, would give the Government the right to revoke, rescind or annul the sale—call it what you will—at any time.
>
> "From a practical standpoint, there would seem to be no difference between the reservation of a right in the Secretary of War to refuse to accept a bid and his right to accept the bid and in the next minute rescind the sale."

We respectfully submit this argument is absolutely fallacious and specious. That the contract, *if executed by the Government,* might have required this plaintiff upon call, to deliver an equal quantity of other nitrate, is not a justification for its refusal to perform its con-

tract of sale of the nitrate in question. Furthermore, the bid having been rejected for one specified reason, the Government will not be heard to attempt a new and entirely different justification:

International Banking Corporation v. *Irving National Bank* (U. S. D. C., N. Y.), 274 Fed., 122;

Greenwood v. *Munson* (C. C. A., 2nd Circuit), 273 Fed., 166;

Goodman v. *Purnell* (C. C. A., 2nd Cir.), 187 Fed. Rep., 90.

It is a curious conceit that by defaulting its undertakings the Government acquires a right which would mature by performance. The whole argument calls upon the Court to dispose of appellant's rights by speculating as to what might have happened in purely conjectural circumstances.

Furthermore, it is respectfully submitted that the clause under discussion would not have given the Government a right to cease delivering nitrate sold to the appellant, except insofar as the latter had not taken delivery thereof prior to November 30, 1922.

(C)

Adequacy of Price.

We venture that never before has this Court heard it suggested that the fall of a hammer at an auction sale without reservation impliedly reserved to the Government officer conducting the sale a right to reject the bid because of his subsequent conclusion that the price was inadequate.

The argument in the Government's brief, page 11, that an officer of the Government could hardly justify or

excuse his acts had he sold Government property worth over two million dollars for a little over seven hundred thousand dollars is entitled to no consideration or respect.

Had the Secretary of War desired, or intended, to reserve any such right of review as is advocated in the Government's brief, he would have adopted the sealed bid method of sale wherein the highest bid could have been considered at leisure, and then accepted or rejected or would have stated his reservation in his terms of sale. In either method a bid is but an offer and the bidder has nothing until his bid has been accepted, but in a public auction, such as in the case at bar, the acceptance is final on the fall of the hammer. The Court has so decided:

Goldberg v. *Daniels,* 37 App. C. D. C., 282; affirmed 231 U. S., 218;
Blossom v. *Milwaukee* R. R. Co., 3 Wall., 196-206.

The Court of Claims (Opinion, pp. 20-21) suggests a similarity between this sale and a judicial sale under direction of the Court.

The Government's brief accepts this suggestion and urges this sale should be so treated (p. 11).

The judicial sales referred to are held under well known and defined rules.

It might be proper to have a statute subjecting Government auctions to such a rule, but suffice it to say no such rule exists or has any application to these sales.

When in the exercise of the power and discretion conferred upon him by the Act of Congress, the Secretary of War determined upon an auction sale with stated terms, he had the right to stop the sale at any time before the fall of the hammer. After that all right of argument as to price was gone.

(D)

Opinion of the Attorney General.

The Government's brief (p. 5) argues the Secretary of War was counselled by the Attorney-General.

This argument fares ill when the facts are observed.

The sale was April 13, 1922.

The Secretary of War undertook to cancel it and refused to sign the contract within ten days.

In June he sought the advice of the Attorney-General and got this advice in January, 1923 (33 Op. A. G., 400). That opinion tallies but poorly with that of the Attorney-General in the matter of Calco Chemical Company, February 12, 1920.

(E)

Opinion of the Court of Claims.

In its opinion the Court of Claims takes the position that the auction was not a sale.

It says:

> "The statutes mentioned, which purport to authorize sales by the Secretary, repose a power and authority in the exercise of which judgment and discretion must be used. He can say when a sale shall be made and pass upon the sufficiency of the price. It may be conceded that the method of securing bids is determinable by him. But an auctioneer has no such power, and is not the person in whom the statute confides authority. The Secretary may not thus divest himself of it. The sale, if such it may be called, was not final, and no title passed until the bid (or the contemplated contract) was finally approved by the official who lawfully represented the Government, and in whom was

> vested judgment and discretion to make a sale. The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale * * *.
>
> In the instant case there was no statutory direction to sell at public auction and authority to make such a sale binding upon the Government at the fall of the auctioneer's hammer cannot be implied. The Secretary of War evidently did not deem, the bid at auction or the knocking down of the property by the auctioneer to have concluded the matter. He did not proceed upon the theory of sale which plaintiff insists upon, and on the contrary he refused to treat it as a consummated transaction. The advertisement of the sale we think notified persons submitting bids that they were subject to approval. And if the printed notice had been less definite the law itself was a sufficient notice of its terms and of the powers conferred by it" (p. 21).

The Government's brief (p. 12) argues "to hold that the action of the auctioneer was final would be to divest the Secretary of the responsibility and discretion conferred upon him by the statute". The petition alleges, and the demurrer admits, that the Secretary of War, by his duly appointed auctioneer, sold the nitrate in question to the plaintiff-appellant.

To construe the transaction as a mere offer is to do violence to the language used in the terms of sale prepared and published by the Secretary. Being prepared by him these terms are to be strictly construed against him when they are uncertain but not to be substituted by new language to effect his change of purpose.

The statute under which the Secretary proceeded (Government's brief, p. 2) confers a discretion as liberal as language can express.

The Court of Claims concedes the statute confers discretion upon him as to when and by what method he will sell but undertakes to nevertheless deny his power to sell at auction.

This denial is inconsistent with the concession of authority to determine his method of sale.

The language of the statute quoted is too broad to be limited by implication or convenience to preclude an auction sale. It would require express language to make such a limitation.

It is against reason to assert that the Secretary has divested himself of the authority and discretion conferred by the statute in selling at public auction.

His discretion and authority were exercised when he ordered the public auction. We venture that the idea here expressed is without precedent in law.

The statements that the sale was not final but only a call for bids, and that the Secretary of War rightly so treated it is likewise novel.

This is a recourse of necessity. To sustain it is to ignore the meaning of all language used before the defense was asserted.

Such a conception cannot survive the reading of the caption of the public advertisement of the sale:

> "To be sold by auction, April 13th, 1922, 10 A. M. Eastern Time, at Washington, D. C."

If a sale was not intended, language has lost its meaning.

Calls for "tentative bids" were never advertised for in this language. The Court of Claims, however, proceeds with its statement:

> "The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale."

True enough, this, as any other bid, effected no sale until it was accepted.

The Court then, ignoring the fact that the Secretary's admittedly duly appointed auctioneer accepted it for him, passed to the unpremised conclusion there was no sale.

Proceeding in the same manner it cites some irrelevant cases when on proper grounds other sales have been held void.

Without considering the extent of the authority conferred upon the Secretary by the statute under consideration, with its obvious purpose of defeating appellant's claim, it states that because there was no statutory direction for a public auction the "authority to make such a sale binding upon the Government at the fall of the auctioneer's hammer cannot be implied."

Like the former statement, this might be correct.

However, no implication of authority is sought here and the statement is not determinative in the case. The statute here was broad enough to convey the authority without implication, the language of the statute being so broad that any method of sale was so clearly authorized, a limitation would have to be clearly expressed.

Whether the Secretary of War deemed this a sale or not and what theory he proceeded upon seems to have been considered important by the Court, but we respectfully submit his views and decisions could not determine appellant's rights.

It is true he refused to "treat it as a consummated transaction," as stated by the Court, but, we submit, that is not reason or law for denial of appellant's rights under his contract.

The Court then announces some other facts that have no bearing upon appellant's claims. It says the advertisement notified bidders they were subject to approval. It says if the advertisement had not, the law notified them of the powers conferred by it.

This is all true. It is the basis of appellant's claim —not the ground for its rejection. The advertisement stated it was to be a sale at auction, and everybody knows a bid is not final until approved and accepted by the auctioneer.

The Court ignores all the language of the admitted terms of sale.

It does not even conclude there was no sale, it simply dismisses appellant's case.

The care with which the Court avoided any statement of the relevant admitted facts of the case and avoided any attempt to arrive at any conclusion of law upon the facts is amazing.

The Court ignored all the admitted facts of the terms of sale. It could not support its decision if it ventured to heed them.

If the terms of sale are read it is impossible to avoid the conclusion that there was a final sale. Let us look at some of the language used.

> "Bidders will be required and should come to the *sale* prepared to make a *deposit* in the form of cash or certified checks made payable to the Treasurer of the United States in the amount of 10% of the *purchase price* of nitrate *purchased.*" (Italics ours.)

There is no suggestion of tentative bidding or reviewing or reservation in that language. There is no use of the customary English expression of a call for tentative bid, that a bidder accompany his bid with a percentage of the bid to be returned by the seller in case the bid is not accepted.

There is nothing like that at this sale.

Understanding the meaning of a *sale* and a deposit on account of an accepted bid, and having thus intelligently and understandingly designated the deposit as a per-

centage of the "*purchase price* of nitrate *purchased*," the terms proceed with no suggestion of any possibility of any return of this deposit but with a provision thus:

> "This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the *purchaser*."

Not only must this purchaser take the whole amount for which his bid is accepted, but he must at all times be paid up 10 per cent ahead of the Government's deliveries of nitrate. Not only must he sign up a written contract to prove his trade, but if he fails to sign up this agreement within ten days after notice of acceptance, which notice he has on the fall of the hammer, his "*deposit of 10% of the purchase price of sodium nitrate purchased*" is forfeit.

Never until suit was commenced was it anywhere suggested there existed any implied reservation of a right to review and reject a bid for inadequacy.

The Court of Claims evolved this fiction out of pure imagination.

(F)

No Allegation of Fraud or Bad Faith.

The Government's brief concludes (p. 13):

> "There is no allegation that the Secretary acted fraudulently or in bad faith or from any unworthy motive."

The action being for damages for breach of contract, such allegations are not necessary. That is sufficient reason for omission of charges of fraud.

Bad faith may be read from the charges of wilful and deliberate refusal to perform the contract.

(G)

In its opinion the Court below (p. 20) suggest that it may be that Congress did not intend to confer upon the Secretary of War any authority to sell sodium nitrate because by a prior act such authority had been given the President.

If such a view were to be indulged it might lead to the result that the act under consideration gave the Secretary power to sell no surplus war materials notwithstanding the breadth of its language because the former acts referred to gave the President a general power to sell any materials he thought proper to sell.

This is all shown to have no bearing on the case, however, when reference is made to the language of the debates in Congress hereinbefore cited (*supra*, p. 8).

POINT III.

The judgment of the Court of Claims must be reversed and assessment of damages directed.

From the foregoing discussion of the decision of the Court of Claims it will be seen that the Court has arrived at no conclusion of law hostile to appellant's claim.

It has stated that the bid of appellant was only an offer until accepted, but it has not found or decided it was not accepted.

It has stated the Secretary of War did not deem it a final transaction but it has not concluded he had any lawful right to not deem it a final transaction.

It has stated the notice of sale advised appellant his bid must be approved before a sale would be effected but it has not found that the bid was not approved. In short

it has dismissed the case without expressing any reason therefor.

This judgment must be reversed as a matter of law unless this Court upon the admitted allegations of the petition can arrive at a conclusion of law that the transaction did not constitute a sale.

That cannot be done without making a new contract for the parties. It is admitted that every act of a sale at auction without reserve was performed and payment on account of purchase price was accepted and retained by the Secretary of War about two months (Petition, par. 64, p. 9).

It is admitted the Secretary refused to complete the contract of sale by delivery only because he considered the price inadequate (Petition, par. 62, p. 9).

Respectfully submitted,

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